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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44789
Plaintiff-Respondent,)	
)	Washington County Case No.
v.)	CR-2015-6485
)	
MARY C. SHORT,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Must Short's appeal of the district court's order revoking her probation be dismissed as untimely?

Short's Appeal Of The District Court's Order Revoking Her Probation Should Be Dismissed
Because It Is Untimely

Short pled guilty to possession of methamphetamine and the district court imposed a unified sentence of six years, with three years fixed, suspended the sentence, and placed Short on supervised probation. (R., pp.25-26, 32-34, 41-46.) After Short violated her probation, the district court revoked Short's probation, executed the underlying sentence, and retained

jurisdiction. (R., pp.94-96.) Following the period of retained jurisdiction, the district court again suspended Short's sentence and placed her on supervised probation. (R., pp.105-08.) Short filed a notice of appeal timely only from the district court's December 14, 2016 order suspending her sentence and reinstating her on probation. (R., pp.109-11.)

"Mindful that the district court subsequently placed her on probation after she participated in a rider," Short nevertheless asserts that the district court abused its discretion by revoking probation and retaining jurisdiction, rather than immediately reinstating her probation, in light of her excuses for violating her no contact order with her husband and for consuming alcohol, her employment and housing, her claim that she had not used methamphetamine since she committed the instant offense, and because she has a car, a driver's license, and SR22 insurance. (Appellant's brief, pp.3-5.) This Court lacks jurisdiction to consider Short's appellate challenge to the district court's decision to revoke her probation because Short did not timely appeal from the order revoking her probation.

Pursuant to Rule 14 of the Idaho Appellate Rules, an appeal may be taken from an order from the district court in any criminal action within 42 days from the date of the filing of the order. I.A.R. 14(a). The requirement of perfecting an appeal within the 42-day time period is jurisdictional, and any appeal taken after expiration of the filing period must be dismissed. I.A.R. 21 (failure to file a notice of appeal within time limits prescribed by appellate rules is jurisdictional and requires automatic dismissal of the appeal).

Short's appeal from the district court's order revoking her probation is untimely. The district court entered its order revoking Short's probation on April 27, 2016. (R., pp.94-96.) Short did not file her notice of appeal until January 25, 2017; 273 days after the entry of the order revoking her probation. (R., pp.109-11.) Although Short did timely file her notice of

appeal from the district court's December 14, 2016 order suspending her sentence and placing her on probation following the period of retained jurisdiction, the timeliness of her appeal from that order does not confer jurisdiction on this Court to entertain the issue Short raises on appeal.

(R., pp.105, 109.) Idaho Appellate Rule 14 provides:

If, at the time of *judgment*, the district court retains jurisdiction pursuant to Idaho Code § 19-2601(4), the length of time to file an appeal from *the sentence* contained in the criminal *judgment* shall be enlarged by the length of time between entry of the judgment of conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided, however, that all other appeals challenging the judgment must be brought within 42 days of that judgment.

I.A.R. 14(a) (emphasis added). An order revoking probation is not a “judgment,” but is an “order made after judgment affecting the substantial rights of the defendant, and may be appealed as a matter of right.” State v. Thomas, 146 Idaho 592, 594, 199 P.3d 769, 771 (2008) (citing Appellate Rule 11(c)(9)). As such, the time to appeal from the order revoking probation is not enlarged when the court retains jurisdiction upon revoking probation. Cf. State v. Yeaton, 121 Idaho 1018, 829 P.2d 1367 (Ct. App. 1992) (the time to appeal from the order revoking probation was not extended by the filing of an I.C.R. 35 motion because an order revoking probation is not a judgment, but is an order made after judgment, which is appealable under I.A.R. 11(c)(9), and the appeal must be filed within forty-two days of that order). Because Short did not timely appeal from the order revoking probation, and because the revocation of her probation is the only issue Short raises on appeal, this Court lacks jurisdiction to consider Short's appellate claim and her appeal must be dismissed.

Even if Short's appeal of the order revoking probation were timely, her claim is moot because, as Short acknowledges, the district court already granted the relief to which she claims she was entitled. (Appellant's brief, p.4.) “An issue becomes moot if it does not present a real

and substantial controversy that is capable of being concluded by judicial relief.” State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations and citations omitted).

Although the district court revoked Short’s probation and retained jurisdiction upon finding a violation, it subsequently placed her back on probation at the conclusion of the retained jurisdiction program. (R., pp.105-08.) Thus, even if this Court were to determine that the district court erred by not immediately reinstating Short’s probation upon finding a violation, such a determination would have no practical effect upon the outcome of the case because the district court already granted the very relief to which Short claims she was entitled – probation. Short’s claim is, therefore, moot and this Court must decline to consider it.

Conclusion

The state respectfully requests this Court to dismiss Short’s appeal of the district court’s order revoking probation as untimely. Alternatively, the state respectfully requests this Court to dismiss Short’s appeal because the only issue she raises is moot.

DATED this 6th day of September, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of September, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General